

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHURCH & DWIGHT CO., INC.,

Plaintiff,

—v—

SPD SWISS PRECISION DIAGNOSTICS,
GMBH,

Defendant.

USDC SDNY
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14-CV-585 (AJN)

PERMANENT
INJUNCTION ORDER

ALISON J. NATHAN, District Judge:

WHEREAS, by Opinion and Order dated July 1, 2015 (Dkt No. 397) (“July 1 Opinion”), the Court determined, *inter alia*, that defendant SPD Swiss Precision Diagnostics (“SPD”) engaged in false advertising under the Lanham Act and that plaintiff Church and Dwight Co., Inc. (C&D) is entitled to a permanent injunction (July 1 Opinion at 1);

WHEREAS the Court has reviewed the subsequent submissions of the parties concerning the proposed wording for a permanent injunction order as directed in the July 1 Opinion (at 50-51);

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED
THAT:

1. SPD and its officers, agents, servants, employees, representatives, parent companies, owners, subsidiaries, and affiliates (the “SPD Parties”) are permanently enjoined from stating, implying, depicting, or otherwise communicating in any advertising or promotional materials or activity in the United States for the product currently known as the Clearblue Advanced Pregnancy Test with Weeks Estimator (“Product”), including but not limited to the advertising referred to in Paragraph 2 below, that the Product provides an estimate of weeks pregnant that is the same as a doctor’s estimate of weeks pregnant.

2. Without in any way limiting the generality of the restraint set forth in the foregoing paragraph:

- a. The SPD Parties are permanently enjoined from disseminating, distributing, broadcasting, or otherwise communicating in any way in the United States all of the advertising for the Product described in pages 12-19 of the July 1 Opinion (including the Internet-Only Commercial).
- b. To the extent that any packaging, advertising or promotional materials for the Product promote the “weeks estimating” feature of the Product, such packaging, advertising or promotional material shall contain or include the following statement: “This product detects pregnancy and estimates weeks since ovulation. The estimate of weeks since ovulation is different from a doctor’s estimate of how many weeks a woman is pregnant, which is based on the first day of the last menstrual period” (the “Clarification Statement”). The Clarification statement shall be (i) in a font size at least 50% as large as the most prominent of the elements of any such advertising or promotional material promoting the “Weeks Estimator” feature of the Product, and (ii) immediately adjacent to the most prominent element(s) of the advertising or promotional material promoting the “Weeks Estimator” feature of the Product. Further, in the case of television or internet advertising, the Clarification Statement shall (i) be visible for at least as long as the elements of any such advertising promoting the “Weeks Estimator” feature of the Product and (ii) for audio advertising, be spoken in a clear and easily understandable manner.
- c. Notwithstanding and without in any way limiting the generality of the foregoing, the SPD parties are permanently enjoined from disseminating, distributing, broadcasting, or otherwise communicating in any way advertising or promotional materials for the Product in the United States which contain or include (i) the words “weeks pregnant,” “weeks along,” “how far along,” or materially similar words or phrases; (ii) images of any of the Product’s digital results windows that contain the word “pregnant” with

numbers and/or the word “weeks”; or (iii) an image of a caduceus. Additionally, SPD shall not use the words “Weeks Estimator” in the Product’s name unless it is modified within the name itself to make clear that it estimates weeks since ovulation only.

3. SPD shall cause to be removed from all retail and other points of sale (e.g. e-commerce websites) the Launch Package (as described in the July 1 Opinion) and the Revised Package (as described in the July 1 Opinion). Removal shall begin immediately upon entry of this Order and be completed by no later than 45 days from the day on which this Order is entered. During this period, SPD shall seek the necessary approval for its new packaging from the U.S. Food & Drug Administration (“FDA”). Failure to receive FDA approval for new packaging does not absolve SPD of its obligation to complete the recall of the existing Product within 45 days.

4. SPD shall, no later than 7 days from the day on which this Order is entered, deliver to all retailers, e-commerce websites, brokers, distributors, dealers, wholesalers, importers, and other non-consumer purchasers of the Product a written notice enclosing this Permanent Injunction Order addressed to each recipient’s principal buyer (or a person holding an equivalent position) stating as follows:

“To: Our Valued Customers

Subject: Clearblue Advanced Pregnancy Test with Weeks Estimator

In January 2014, Church & Dwight filed a civil suit against SPD Swiss Precision Diagnostics GmbH, manufacturer of Clearblue®, alleging false and misleading advertising. On July 1, 2015, the United States District Court for the Southern District of New York ruled in favor of Church & Dwight and has issued the enclosed permanent injunction with respect to the Clearblue® Advanced Pregnancy Test with Weeks Estimator, enjoining previous advertising for the Product.

The Clearblue® Advanced Pregnancy Test with Weeks Estimator detects pregnancy and estimates weeks since ovulation. The Product’s estimate of weeks since

ovulation is different from a doctor's estimate of how many weeks a woman is pregnant, which is based on the first day of last menstrual period and ultrasound results.

The Court has ordered that the existing packaging for the Product be recalled. However, the Court found no issue with the safety of the Product itself, which was and remains cleared by the FDA. A copy of the Court's findings can be found at [URL for link to the opinion]. Should you have any questions about how the Clearblue® Advanced Pregnancy Test with Weeks Estimator results compare to a Doctor's estimate, please do not hesitate to contact us directly at: XXXXXX@clearblue.com and the following telephone number: XXXXXXXXXX.”

- a. Subject to FDA approval, SPD may include in the foregoing notice (the “Corrective Notice”) additional explanation in written or chart form about how the Product's estimate compares to how a doctor would date a pregnancy.
- b. The Corrective Notice shall be delivered in a manner calculated to ensure receipt by the appropriate recipient and shall not be accompanied by any other advertising or promotional materials.

5. SPD shall, for a period of one year from the date on which this Order is entered, make available copies of the Corrective Notice (with copies of the Permanent Injunction Order appended thereto) at all U.S. trade shows and professional meetings attended by SPD or any party representing SPD's interests. Copies of the Corrective Notice (with copies of the Permanent Injunction Order appended thereto) shall be placed in a prominent location at SPD's display or “booth” at each such trade show and professional meeting. The Corrective Notice shall not be accompanied by any other advertising or promotional materials.

6. Beginning no later than 7 days from the day on which this Order is entered and for a period of one year thereafter, SPD shall maintain a stand-alone page on the www.clearblueeasy.com website. The home page of the website and the Product web page shall include a prominent link, visible without scrolling, to the stand-alone page. The link shall be entitled “Corrective Notice: Clearblue® Advanced Pregnancy Test with Weeks Estimator.” The

stand-alone page shall contain the following statement: “In January 2014, Church & Dwight filed a civil suit against SPD Swiss Precision Diagnostics GmbH, manufacturer of Clearblue®, alleging false and misleading advertising. On July 1, 2015, a federal court ruled in favor of Church & Dwight, enjoining previous advertising for the Product. The Clearblue® Advanced Pregnancy Test with Weeks Estimator detects pregnancy and estimates weeks since ovulation. The product’s estimate of weeks since ovulation is different from a doctor’s estimate of how many weeks a woman is pregnant, which is based on the first day of the last menstrual period.” The standalone page shall also provide a link to the text of the July 1 Opinion, with text stating “Click here to read a copy of the Court’s decision.”

7. As expeditiously as possible, SPD shall cause to be published in retailer circulars the following statement: “In January 2014, Church & Dwight filed a civil suit against SPD Swiss Precision Diagnostics GmbH, manufacturer of Clearblue®, alleging false and misleading advertising. On July 1, 2015, a federal court ruled in favor of Church & Dwight, enjoining previous advertising for the Product. The Clearblue® Advanced Pregnancy Test with Weeks Estimator detects pregnancy and estimates weeks since ovulation. The product’s estimate of weeks since ovulation is different from a doctor’s estimate of how many weeks a woman is pregnant, which is based on the first day of the last menstrual period. A copy of the Court’s Opinion including these findings can be found at [URL for link to the opinion].” This statement shall be published in the same circulars, in the same size, with the same frequency and for the same duration as SPD’s circular advertising for the Product to date. The Clearblue logo shall be prominently displayed in each such circular placement.

8. As expeditiously as possible, SPD shall cause to be published internet banner advertising, prominently displaying the Clearblue logo, stating the following: “A federal court has determined that the maker of Clearblue® Advanced Pregnancy Test with Weeks Estimator engaged in false advertising. The product’s estimate of weeks since ovulation is different from a doctor’s estimate of how many weeks a woman is pregnant, which is based on the first day of the

last menstrual period.” The banner advertising shall run with the same frequency, for the same duration and on the same websites as SPD’s banner advertising for the Product to date.

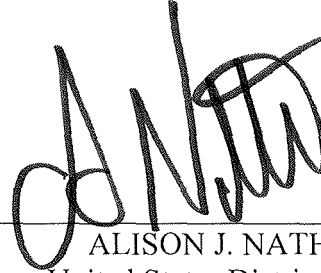
9. As expeditiously as possible, SPD shall cause to be published in *American Baby*, *Parents*, and *US Weekly* magazines a full-page advertisement stating the following: “In January 2014, Church & Dwight filed a civil suit against SPD Swiss Precision Diagnostics GmbH, manufacturer of Clearblue®, alleging false and misleading advertising. On July 1, 2015, a federal court ruled in favor of Church & Dwight. The Clearblue® Advanced Pregnancy Test with Weeks Estimator detects pregnancy and estimates weeks since ovulation. The product’s estimate of weeks since ovulation is different from a doctor’s estimate of how many weeks a woman is pregnant, which is based on the first day of the last menstrual period. A copy of the Court’s Opinion including these findings can be found at [URL for link to the opinion].”

10. No later than 30 days from the day on which this Order is entered, SPD shall produce a video (“Explanatory Video”) explaining the difference between the Product’s estimate of weeks since ovulation and how a doctor dates pregnancy from last menstrual period, and make it prominently available: (a) on its web home page ready to play without scrolling down for a period of one year; (b) on the stand-alone page described in paragraph 6 for a period of one year; (c) as its first video on the landing page of the Clearblue YouTube channel for a period of six months; (d) as the first result for the next six months of any YouTube search with the words “Weeks Estimator”; and (e) on the Clearblue Facebook page which currently has approximately 475,000 fans. The following statement shall be prominently displayed on screen at the beginning of the Explanatory Video: “In July 2015, a federal court found the manufacturer of the Clearblue® Advanced Pregnancy Test with Weeks Estimator to have engaged in false advertising. For a copy of the Court’s decision, please visit [URL for link to the opinion].”

11. Within 60 days of the day on which this Order is entered, SPD shall file with the court a sworn declaration setting forth in detail the manner in which it has complied with the provisions of this Order.

SO ORDERED.

Dated: August 26, 2015
New York, New York

A handwritten signature in black ink, appearing to read 'A. Nathan', written over a horizontal line.

ALISON J. NATHAN
United States District Judge